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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA**

IN RE WAL-MART WAGE AND HOUR  
EMPLOYMENT PRACTICE LITIGATION

MDL 1735

THIS DOCUMENT RELATES TO:  
ALL ACTIONS EXCEPT KING v.  
WAL-MART STORES, INC., CASE NO.  
07-1486-WY

2:06-CV-00225-PMP-PAL  
(BASE FILE)

**REPLY TO OBJECTOR FATIMA ANDREWS' OPPOSITION TO  
CLASS COUNSEL'S MOTION FOR RULE 37 SANCTIONS**

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17 20 James Wm. Moore, *Moore's Federal Practice*, § 303.32[1] (3d ed. 2000)

18  
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20 *Been Filed*, 143 F.R.D. 307, 322 (1992)

21  
22 Federal Rule of Civil Procedure 37

23  
24 Federal Rule of Civil Procedure 11

1 **INTRODUCTION**

2

3 On February 10, 2010, the Plaintiff Class through the undersigned counsels filed a  
 4 Motion for Imposition of Sanctions Against Objector Fatima Andrews and Her Counsels John J.  
 5 Pentz and Edward Cochran based on the willful failure of Fatima Andrews to appear at a court  
 6 ordered deposition and the related conduct of her Counsels. *See* Docket no. 592, Plaintiffs'  
 7 Motion for the Imposition of Sanctions Against Objector Fatima Andrews and Her Counsels  
 8 John Pentz and Edward Cochran (hereafter, "Motion for Sanctions"), February 10, 2010.  
 9  
 10 Despite the grave seriousness of the matter at hand, the impact the conduct in issue had on  
 11 parties in MDL 1735, and the fact that any opposition to Plaintiffs' Motion for Sanctions was  
 12 due by February 27, 2010, Fatima Andrews and her Counsels, John Pentz and Edward Cochran,  
 13 knowingly elected not file a true opposition. Rather, they placed on file a pleading captioned  
 14 "Motion to Strike Class Counsel's Motion for Rule 37 Sanctions Against Objector Fatima  
 15 Andrews" (hereafter, "Motion to Strike") that at its core contained such glaring legal defects that  
 16 it must be considered at or next to a worthless token effort. *See* Docket no. 601, February 23,  
 17 2010.<sup>1</sup> For reasons set forth below, in responding to the filing of the Motion to Strike, Plaintiffs  
 18 hereby construe it as the opposition of Objector Fatima Andrews and Her Counsels John Pentz  
 19 and Edward Cochran (hereafter "Andrews, Pentz and Cochran") to Plaintiffs' Motion for the  
 20 Imposition of Sanctions Against Objector Fatima Andrews and Her Counsels John Pentz and  
 21 Edward Cochran (hereafter, "Motion for Sanctions"). *See* Docket no. 592, February 10, 2010.

22

23 Rather than effectively attack or even acknowledge the merits of the Plaintiffs' Motion  
 24 for Sanctions, Andrews, Pentz and Cochran alternatively offer in response absolutely no defense

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28<sup>1</sup> In the alternative, this submission serves as an Opposition to Docket 601.

1 whatsoever, or, a legally defective request that this Court strike the Motion for Imposition of  
 2 Sanctions on a certain and discrete basis. In support of their bizarre request to strike the Motion  
 3 for Sanctions, Andrews, Pentz and Cochran limit themselves to two (2) discrete basis. The  
 4 discrete basis relied upon by Andrews, Pentz and Cochran are easily disposed of because they  
 5 are contrary to express applicable legal authority and the Motion for Sanctions should be  
 6 allowed. Nothing requested impacts the substantial rights directly involved in the appeal.  
 7

8 **Procedural History**

9 The facts of this case have been briefed in full in the Motion for Sanctions.<sup>2</sup> The  
 10 following brief overview focuses only on a review of a few relevant facts. On September 24,  
 11 2009, Andrews and her counsel, John Pentz and Edward Cochran, both self-described  
 12 Professional Objectors, objected to the Settlement. *See* Docket no. 385, September 24, 2009.

13 On October 5, 2009, this Honorable Court granted Plaintiffs' Motion for expedited  
 14 discovery. *See* Docket no. 441, Unopposed Emergency Motion for an Expedited Deposition  
 15 Schedule, October 5, 2009. Given the context and short time-frame to accomplish discovery on  
 16 objectors to the then proposed Settlement of MDL 1735, Plaintiffs next quickly formally took  
 17 action on October 6, 2009 to insure that the depositions of Objector Andrews would be taken.  
 18 *See* Docket no. 447-3, Notice to Take Deposition of Fatima Andrews, October 6, 2009. On  
 19 October 9, 2009, Judge Polster of the United States District Court for the Northern District of  
 20 Ohio Eastern Division granted a motion to compel the attendance of Objector Andrews at the  
 21 October 12, 2009 deposition. On October 9, 2009, at 6:26 p.m., Process Server Clint  
 22

26  
 27 <sup>2</sup> For the sake of brevity, and because none of the factual assertions or argument included in the moving papers were  
 28 addressed, the merits of the request for sanctions need not be restated here. Instead, Plaintiffs simply incorporate by  
 reference their Motion for Sanctions.

1 Massengale, an employee of New Age Delivery, Courier and Freight, served the Deposition  
 2 Subpoena personally upon Andrews at her residence at 16305 Trafalgar Street, Cleveland, Ohio,  
 3 44110. Despite being served the Subpoena and Deposition Notice, and having notice of Judge  
 4 Polster's order, neither Andrews nor her Counsel appeared for the scheduled deposition on  
 5 October 12, 2009. *See generally* Docket no. 447-3, Notice to Take Deposition of Fatima  
 6 Andrews, October 6, 2009; Docket no. 458, Subpoena, October 12, 2009.

7 The Plaintiff Class through the undersigned counsels then filed a Motion seeking to  
 8 impose sanctions including Attorneys fees. *See* Docket no. 592, Motion for Sanctions. Objector  
 9 Andrews through Counsel seeks to oppose the Motion for Sanctions on jurisdictional grounds.  
 10 *See* Docket Docket no. 601, Motion to Strike.

11 **ARGUMENT**

12 Andrews, Pentz and Cochran did not object to the imposition of the requested sanctions  
 13 on the merits. Rather, they seek to avoid accountability purely on their opinion that this Court  
 14 lacks jurisdiction. More specifically, Andrews, Pentz and Cochran limit their jurisdictional  
 15 objection to two (2) discrete basis. They are: 1) the notice of appeal divested the District Court  
 16 of Jurisdiction, and 2) the Motion must be filed in the Ohio court that issued the order  
 17 compelling Objector Andrews to appear at the deposition. *See* Docket no. 601, Motion to Strike  
 18 Class Counsel's Motion for Rule 37 Sanctions Against Objector Fatima Andrews (hereafter,  
 19 "Motion to Strike"), February 23, 2010. Both are legally unsupported and must be rejected.

20 It is important to note that here, as with other pleadings, Objector and Counsel cite only  
 21 limited authority that does little to support their position and in their rush to force inapposite  
 22 snippets into failing arguments they also once again fail to cite to additional authority, including  
 23 well established United States Supreme Court and Ninth Circuit law that directly contradicts

1 their position. A review of the applicable authority on the issue raised makes clear that the  
2 Motion to Strike is devoid of merit and must be denied and that the time of the Parties to this  
3 litigation. This Court has once again been needlessly consumed by a frolic advanced by  
4 Andrews, Pentz and Cochran.

6

7 **I. Filing of the Notice of Appeal DOES NOT Divest the District Court of  
8 Jurisdiction to Address The Motion for Imposition of Sanctions**

9 Andrews, Pentz and Cochran's claim that this Court no longer has jurisdiction to  
10 adjudicate the Motion for Imposition of Sanctions is directly contrary to Nevada local rules and  
11 Federal authority, including authority in the 9<sup>th</sup> Circuit. Andrews, Pentz and Cochran have  
12 misconstrued case law and failed to acknowledge, cite, or distinguish the ample body of contrary  
13 case law. In fact, the crushing weight of authority requires that the Motion to Strike be denied.

15

16 **A. Federal District Court of Nevada Local Rule IA 4-1 Sanctions Does Not  
17 Limit Jurisdiction or Timing of Sanctions**

18 Plaintiff Class properly filed its motion for imposition of Sanctions in the United States  
19 District Court of Nevada, the venue where the underlying litigation was pending. Accordingly,  
20 the most obvious and appropriate source of authority is the local rules for the Federal District  
21 Court of Nevada. The local rules "shall be construed so as to be consistent with the Federal  
22 Rules of Civil Procedure.....The provisions of Parts IA and II apply to all actions and  
23 proceedings...except where they may be inconsistent with rules or provisions of law specifically  
24 applicable thereto..." LR IA 2-1 Scope of Rules; Construction. Local Rule IA 4-1 dealing with  
25 Sanctions states:  
26  
27

1       The court may, after notice and opportunity to be heard, impose any and all appropriate  
2       sanctions on an attorney or party appearing in pro se who, without just cause:

- 3
- 4               (a) Fails to appear when required for pretrial conference, argument on motion, or  
5               trial;
- 6
- 7               (b) Fails to prepare for a presentation to the court;
- 8
- 9               (c) Fails to comply with these rules; or
- 10
- 11               (d) Fails to comply with any order of this court.

12

13       Although the Plaintiff Class sought sanctions under Federal Rule 37 and 11 and not under this  
14       local rule, it is important to note that there is nothing in the local rule that limits the jurisdiction  
15       of this Court or timing of a filing of a motion for sanctions.

16

17       **B.       Federal Authority DOES NOT Divest the District Court of Jurisdiction to  
18               Address Plaintiff's Motion for Imposition of Sanctions.**

19

20       Despite the Objector's cursory, limited and unpersuasive arguments to the contrary, 9<sup>th</sup>  
21       circuit authority holds that the notice of appeal in this matter does not divest the district court of  
22       jurisdiction to address Plaintiff's Motion for Sanctions. A thorough review of applicable  
23       authority squarely allows the District Court to decide this issue.

24

25

26       **1.       The *Griggs* Case Cited By Pentz is Only the General Rule – It  
27               Fails to Account for Applicable Exceptions**

1       Generally, the filing of a notice of appeal is an event of jurisdictional  
 2 significance - it confers jurisdiction on the court of appeals and divests the district court of its  
 3 control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer*  
 4 *Discount Co.*, 459 U.S. 56, 58 (1982). *See also Trulis v. Barton*, 107 F.3d 685, 694-5 (9<sup>th</sup> Cir.  
 5 1995). This rule is judge-made: its purpose is to promote judicial economy and avoid the  
 6 confusion that would ensue from having the same issues before two courts simultaneously.  
 7 *Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 956 (9th Cir.1983); 20 James Wm. Moore,  
 8 *Moore's Federal Practice*, § 303.32[1] (3d ed.2000).

9       The principle of exclusive appellate jurisdiction is not absolute.  
 10      *Masalosalo*, 718 F.2d at 956. The district court retains jurisdiction during the pendency of an  
 11 appeal to act to preserve the status quo. *Newton v. Consolidated Gas Co.*, 258 U.S. 165, 177  
 12 (1922); *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th  
 13 Cir.1976); *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 79 (9th Cir.1951), and to  
 14 address collateral issues.<sup>3</sup> The District Court retains jurisdiction to deal with issues that will not  
 15  
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18  
 19      <sup>3</sup> This exception to the jurisdictional transfer principle has been codified in Rule 62(c) of the Federal Rules of Civil  
 20 Procedure, which allows a District Court to "suspend, modify, restore, or grant an injunction during the pendency of  
 21 the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse  
 22 party." This Rule grants the District Court no broader power than it has always inherently possessed to preserve the  
 23 status quo during the pendency of an appeal; it "does not restore jurisdiction to the district court to adjudicate anew  
 24 the merits of the case." *McClatchy Newspapers v. Central Valley Typographical Union*, 686 F.2d 731, 734 (9th Cir.  
 25 1982). Thus, any action taken pursuant to Rule 62(c) "may not materially alter the status of the case on appeal."  
 26 Allan Ides, *The Authority of a Federal District Court to Proceed After a Notice of Appeal Has Been Filed*, 143  
 27 F.R.D. 307, 322 (1992). *See also Natural Resources Defense Council, Inc. v. Southwest Marine Inc.* 242 F.3d 1163,  
 28 1166 (9th Cir. 2001). Nothing requested impacts the substantial rights directly involved in the appeal.

1 impact substantial rights directly involved in the appeal. *Newton v. Consolidated Gas Co.*, 258  
 2 U.S. at 177. (citations omitted) (statement of the rule prior to its codification), citing *Hovey v.*  
 3 *McDonald*, 109 U.S. 150, 157 (1883), and *Merrimack River Savings Bank v. Clay Center*, 219  
 4 U.S. 527, 534 (1911).

5

6 **2. A Specific Exception to *Griggs*, Recognized by U.S. Supreme Court  
 7 and Adopted by the 9<sup>th</sup> Cir., is Attorney's Fees and Sanctions**

8 An exception to the above general rule is the area of attorney's fees and sanctions.  
 9  
 10 In *United States v. Community Home and Health Care Serv., Inc.*, 550 F.3d 764, 766 (9<sup>th</sup> Cir.  
 11 2008), the 9<sup>th</sup> Circuit recognized the Supreme Court case of *White v. New Hampshire Dep't of*  
 12 *Employment Sec.*, 455 U.S. 445, 451-452 (1982). In *White*, the Supreme Court addressed the  
 13 relevant issue of whether a request for attorney's fees raises legal issues collateral to the main  
 14 action prompting an inquiry separate and apart from the decision on the merits. *Id.* at 451-52.  
 15 Following *White*, the 9<sup>th</sup> Circuit held that a District Court retains the power to award attorney's  
 16 fees after a notice of appeal from the decision on the merits has been filed. *Masalosalo v.*  
 17 *Stonewall Ins. Co.*, 718 F.2d 955, 957 (9<sup>th</sup> Cir. 1983). Also, the District Court adopted the  
 18 "bright-line rule" that "all attorney's fees requests are collateral to the main action," rendering a  
 19 "judgment on the merits . . . final and appealable even though a request for attorney's fees is  
 20 unresolved." *Int'l Assoc. of Bridge Local Union 75 v. Madison Indus., Inc.*, 733 F.2d 656, 659  
 21 (9th Cir. 1984). The 9<sup>th</sup> Circuit has recognized that the District Court retains jurisdiction in an  
 22 application for sanctions and attorneys fees provided the motion is filed *either* before an appeal  
 23 is perfected or during pendency of the appeal on the merits. *ITEL Securities Litigation*, 791 F.2d  
 24  
 25  
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 27  
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1 672, 675 (9<sup>th</sup> Cir. 1986) (citing *Overnight Transportation Company v. Chicago Industrial Tire*  
 2 *Company*, 697 F.2d 789, 793 (7<sup>th</sup> Cir. 1983).

3 Likewise, Rule 11 sanctions may be entered by the district court after a notice of  
 4 appeal has been filed. *Val-Land Farms, Inc. v. Third National Bank*, 937 F.2d 1110, 1117 (6<sup>th</sup>  
 5 Cir. 1991) (citing *Mitchell v. Herbertson*, 1992 U.S. Dist. LEXIS 15130, \*9 (N.D. Cal. 1992).  
 6 See also *Mary Ann Pensiero, Inc. v Lingle*, 847 F2d 90 (3d. Cir 1988). The timeliness of a Rule  
 7 11 motion rests within the judge's discretion. *Hicks v Maryland Health Sys. Agency*, 805 F2d  
 8 1165 (4<sup>th</sup>. Cir 1986). The District Court can impose sanctions even if it ultimately lacks  
 9 jurisdiction. *Willy v. Coastal Corp.*, 112 S. Ct. 1076, 1080-81 (1992) (holding that a district  
 10 court could constitutionally impose Rule 11 sanctions in a case in which was later determined  
 11 that the court lacked subject matter jurisdiction); *Westlake N. Property Owners Ass'n. v. City of*  
 12 *Thousand Oaks*, 915 F.2d 1301, 1303 (9th Cir. 1990) (finding "even if a court does not have  
 13 jurisdiction over an underlying action, it may have jurisdiction to determine whether the parties  
 14 have abused the judicial system and whether sanctions are appropriate to remedy such abuse.")  
 15

16 **3. The 9<sup>th</sup> Circuit has upheld the Imposition of Sanctions After the Filing of an  
 17 Appeal**

18 In *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1410 (9<sup>th</sup> Cir. 1990), the 9<sup>th</sup> Circuit  
 19 upheld an imposition of sanctions sought under FRCP 37 after an appeal was filed and stated:

20  
 21  
 22  
 23  
 24 We fully recognize the problems created if parties are permitted to refuse to comply  
 25 with court orders with which they disagree, and we endorse the "basic proposition  
 26 that all orders and judgments of courts must be complied with promptly." *Maness v.*  
 27 *Meyers*, 419 U.S. 449, 458 (1975) ("If a person to whom a court directs an order  
 28 believes that order is incorrect the remedy is to appeal, but absent a stay, he must

1 comply promptly with the order pending appeal. Persons who make private  
 2 determinations of the law and refuse to obey an order generally risk criminal  
 3 contempt even if the order is ultimately ruled incorrect.")  
 4

5 The 9<sup>th</sup> Circuit in *Britton* rejected the appellant's argument that the appeal divested the  
 6 District Court of jurisdiction. *Id.* at 1411. Citing, from Moore's *Federal Practice* treatise,  
 7 the Court, sounding the death knell for the argument Pentz makes here, found, "where an  
 8 appeal is taken from a judgment which does not finally determine the entire action, the  
 9 appeal does not prevent the district court from proceeding with matters not involved in the  
 10 appeal." J. Moore, para. 203.11, 3-54." *Id.*

12 The *Britton* Court also distinguished the *McClatchy* case cited by Pentz stating:

13  
 14 In *McClatchy* the modified order reflected *a change in the result of the very issue*  
 15 *on appeal*; if allowed to stand, the appeals court would be dealing with a moving  
 16 target if it ruled on the revised order or, alternatively, its ruling would be obsolete  
 17 if it ruled on the "old" order. *McClatchy* does not prevent the district court in the  
 18 present case from proceeding with the independent issues presented in the  
 19 underlying case. The district court is simply moving the case along consistent  
 20 with its view of the case as reflected in its order denying arbitration.

21  
 22  
 23 *Britton v. Co-op Banking Group* 916 F.2d 1405, 1411 -1412 (9th Cir. 1990) (emphasis added)

24  
 25 **4. Under the Circumstances Presented Here, This Court Has the Power to**  
 26 **Decide Plaintiffs' Motion for the Imposition of Sanctions**

1       In the situation presented here, Plaintiff's Motion for Imposition of Sanctions falls  
 2 squarely within the exception to the *Griggs'* rule as it is a collateral matter that will not  
 3 affect any substantial rights that are the subject of the appeal. Plaintiff's Motion requests  
 4 an order from the District Court imposing sanctions and awarding attorneys fees because  
 5 Objector Andrews and his Counsel failed to attend a noticed and court ordered deposition.  
 6 As set forth above, 9<sup>th</sup> Circuit authority indicates that such requests are an exception to the  
 7 *Griggs'* rule that does not divest the district court of jurisdiction. The record for the appeal  
 8 has already been determined and is before the appellate court. An award of sanctions and  
 9 fees, as requested here, will not affect the appeal in any way and thus is appropriately  
 10 before the District Court.

13       Jurisdiction in the District Court is in no way contrary to the purpose of the *Griggs'*  
 14 Rule. *See Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 956 (9th Cir.1983) (its purpose  
 15 is to promote judicial economy and avoid the confusion that would ensue from having the  
 16 same issues before two courts simultaneously.) Judicial economy is in no way implicated  
 17 and there would be no confusion if the District Court addresses the sanctions motion. This  
 18 is not the situation where the same issue is before two courts. To the contrary, the issue of  
 19 imposition of fees and sanctions does not arise in the appellate court in any way, shape or  
 20 manner.       Objector Andrews and her Counsel chose to ignore a clear order of the  
 21 District Court and it is the District Court which should properly decide whether as a result  
 22 they should be sanctioned and ordered to pay Attorney's fees.

26       **II.      Motion for Sanctions Was Appropriately Filed in the District of Nevada**

Objector Andrews and Counsel take the position the Motion for Sanctions should be decided in another Court. This position is wrong. Plaintiff's Motion for Sanctions was based upon Federal Rule of Civil Procedure 37 and Rule 11. The clear language of the Federal Rules indicates that the District of Nevada is the appropriate jurisdiction to address Plaintiff's Motion for Imposition of Sanctions. Federal Rule of Civil Procedure 37(b) anticipates motion for sanctions in either the district court where a deposition is taken (FRCP 37(B)(1) OR in the District Court where an action is pending (FRCP 37(b)(2). With regard to the latter the rule states:

(2) *Sanctions in the District Where the Action Is Pending.*

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
  - (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
  - (iii) striking pleadings in whole or in part;
  - (iv) staying further proceedings until the order is obeyed;
  - (v) dismissing the action or proceeding in whole or in part;
  - (vi) rendering a default judgment against the disobedient party; or
  - (vii) treating as contempt of court the failure to obey any order

except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Rule 37(b)(2)(A) specifically addresses the situation presented here where Objector and Counsel failed to obey a discovery order requiring attendance at a deposition. The rule is broadly interpreted and not limited by its terms in any way to an “order” issued in the District where the action is pending or where the deposition is to be taken. The notes to this rule explain:

The scope of Rule 37(b)(2) is broadened by extending it to include any order “to provide or permit discovery,” including orders issued under Rules 37(a) and 35. Various rules authorize orders for discovery--*e.g.*, Rule 35(b)(1), Rule 26(c) as revised, Rule 37(d). *See* Rosenberg, *supra*, 58 Col.L.Rev. 480, 484-486. Rule 37(b)(2) should provide comprehensively for enforcement of all these orders. *Cf.* *Societe Internationale v. Rogers*, 357 U.S. 197, 207 (1958).

## Federal Rules of Civil Procedure Rule 37

FRCP 37(b)(2) Expressly Gives Judge Pro, As the Judge Sitting in the District "*where the action is pending*", the Jurisdiction to Assess any "Just Orders" for the failure to obey a Discovery

1 Order – There is no legitimate support for the position advocated by Pentz and Objector  
 2 Andrews that Jurisdiction Solely Resides “*in the District Where the Deposition is Taken.*”  
 3

4 As a party to this action, Objector Andrews and her Counsel are subject to the jurisdiction  
 5 of the District of Nevada with regard to remedies available under Rule 37: “If the deposition of a  
 6 party is being taken in a district other than that in which the action is pending, another party  
 7 seeking to compel an answer has a choice of forum but the court to which he applies may send  
 8 him to the other court if it seems more appropriate.” *First Nat. Bank at Thermopolis v. Western*  
 9 *Cas. and Sur. Co.* 598 F.2d 1203, 1206 (C.A.Wyo., 1979). *See also 4A Moore's Federal*  
 10 *Practice* P 37.02(1), at 37-30.1 (2d ed. 1978); *B. F. Goodrich Tire Co. v. Lyster*, 328 F.2d 411,  
 11 415 (5th Cir. 1964); *Braziller v. Lind*, 32 F.R.D. 367, 367 (S.D.N.Y.1963); *Gottlieb v. Isenman*,  
 12 15 F.R.D. 88, 89 (D.Mass.1953). This is consistent with the scope and purpose of the Federal  
 13 Rules of Civil Procedure. “to secure just, speedy and inexpensive determination of every  
 14 proceeding.” FRCP 1

15 Rule 37(b)(2) requires two things: (1) a court order must be in effect and (2) the order must be  
 16 violated. In this case, both requirements are satisfied and the District Court for Nevada is  
 17 appropriately empowered to order remedies under Rule 37.<sup>4</sup>

18 Rule 37 (d) addresses a situation where a party fails to attend its own deposition even in the  
 19 absence of a court order

20 Federal rule F.R.Civ.P. 37(d)(1)(A) empowers a court to "order sanctions" if a party  
 21 "fails, after being served with proper notice, to appear for that person's deposition" or  
 22 fails to serve answers to interrogatories and document requests. Such failure "is not  
 23 excused on the ground that the discovery sought was objectionable, unless the party

24  
 25  
 26  
 27  
 28 <sup>4</sup> Again, this Court also issued a related order and so the position of Counsel and Client is even more removed from  
 the range of reasonableness.

1 failing to act has a pending motion for a protective order under Rule 26(c)." F.R.Civ.P.  
 2 37(d)(2). Sanctions may include those provided in F.R.Civ.P. 37(b)(2)(A)(i)-(vi).  
 3 F.R.Civ.P. 37(d)(3).

4

5 A party who fails to appear for a deposition is subject to sanctions even in the absence of  
 6 a prior order. F.R.Civ.P. 37(d); Hilao v. Estate of Marcos, 103 F.3d 762, 764-765 (9th  
 7 Cir. 1996) (unexplained failure to appear at deposition in contempt proceeding justified  
 8 sanction deeming allegations to be established); Henry v. Gill Industries, Inc., 983 F.2d  
 9 943, 947 (9th Cir. 1993).

10

11

12 Plaintiff also sought sanctions pursuant to Federal Rule of Civil Procedure 11. The United  
 13 State Supreme Court has already determined that the scope of FRCP 11 is broad and is intended  
 14 to apply to all district court civil proceedings. Willy v Coastal Corp., 112 S. Ct. 1076, 1080-81  
 15 (1992). The Federal District Court was authorized to impose sanctions pursuant to FRCP 11,  
 16 even though court was later determined to lack subject matter jurisdiction, since expansive  
 17 language of FRCP 1 and 81(c) indicate clear intent to have Rules, including Rule 11, apply to all  
 18 district court civil proceedings.

19

**CONCLUSION**

20

21 The Plaintiff Class through the undersigned Counsel scheduled a deposition of Objector  
 22 Andrews. Objector Andrews was under a Court order from Judge Pro and Judge Polster to  
 23 attend. Andrews, Pentz and Cochran chose to ignore the very clear orders without seeking a  
 24 protective order or later taking any action whatsoever. They ignored safe harbor letters seeking  
 25 to informally resolve this dispute instead choosing to needlessly waste more time and insert more  
 26 delay. The conduct complained of certainly warrants sanctions and in context, is certainly  
 27

needed. Nothing requested impacts the substantial rights directly involved in the appeal. After the question of whether the District of Nevada is the appropriate place to hear the motion for sanctions and attorneys fees resulting from Objector Andrews' failure to abide by an order of that court is decided favorably, the requested sanctions should be awarded to avoid further needless delay and wasted resources. The law is clear that the District of Nevada is the appropriate forum for this issue and the motion to strike filed by Objector Andrews is not well-grounded in any supporting law. To the extent that it is properly before the Court, Objector Andrews Motion to Strike must be denied and Plaintiffs' Motion for Sanctions should be allowed.

Dated: March 5, 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 5, 2010, a copy of the foregoing *Reply to Objector Fatima Andrews' Opposition to Class Counsel's Motion for Rule 37 Sanctions* was filed electronically [and served by mail on anyone unable to accept electronic filing]. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system [or by mail to anyone unable to accept electronic filing]. Parties may access this filing through the Court's system.

/s/ Robert J. Bonsignore  
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